

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CIVIL MINUTES--GENERAL

Case No. CV 12-5997 AJW

Date: February 7, 2013

Title: MAHDAD ZAND v. MICHAEL AND ASSOCIATES

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PRESENT: **HON. ANDREW J. WISTRICH, MAGISTRATE JUDGE**

Ysela Benavides
Deputy Clerk

Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS: ATTORNEYS PRESENT FOR DEFENDANTS:
None Present None Present

ORDER REGARDING DEFENDANT'S MOTION TO DISMISS

Defendant filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), which plaintiff opposes. In support of its motion, defendant has submitted declarations and exhibits, and asked the court to take judicial notice of specified facts.

A complaint may be dismissed for failure to state a claim upon which relief can be granted. See Fed. R. Civ. P. 12(b)(6); Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001), overruled on other grounds, Galbraith v. County of Santa Clara, 307 F.3d 1119 (9th Cir. 2002). To survive dismissal, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)(quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007), and citing Twombly, 550 U.S. at 556). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." Twombly, 550 U.S. at 555 (internal quotation marks and ellipsis omitted). The court must accept as true all factual allegations contained in the complaint. That principle, however, "is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Iqbal, 556 U.S. at 678.

Dismissal under Federal Rule 12(b)(6) may be based on either: (1) lack of a cognizable legal theory, or (2) insufficient facts under a cognizable legal theory. SmileCare Dental Group v. Delta Dental Plan of California, Inc., 88 F.3d 780, 783 (9th Cir.) (citing Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 533-34 (9th Cir. 1984)), cert. denied, 519 U.S. 1028 (1996). Dismissal also is appropriate if the complaint alleges a fact that necessarily defeats the claim. Franklin v. Murphy, 745 F.2d 1221, 1228-1229 (9th Cir. 1984).

For purposes of dismissal, the court "consider[s] only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." Akhtar v. Mesa, 698 F.3d 1202, 1212 (9th Cir. 2012)(quoting Swartz v. KPMG LLP, 476 F.3d 756, 763 (9th Cir. 2007)); see Lee, 250 F.3d at 688. "If, on a motion under Rule 12(b)(6) . . . , matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d).

The court is not authorized to take judicial notice of the matters set forth in the request for judicial notice. See Fed. R. Evid. 201; Rivera v. Philip Morris, Inc., 395 F.3d 1142, 1151 (9th Cir. 2005)(urging district courts to be cautious in taking judicial notice). Nor can it properly consider in this context the matters contained in the defendant's declarations and exhibits. Although defendant might eventually possess a basis for filing a motion for summary judgment, on the present record it lacks a sufficient basis for obtaining dismissal under Fed. R. Civ. P. 12(b)(6).

For the foregoing reasons, the motion to dismiss is **denied**.

IT IS SO ORDERED.

cc: Parties

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CIVIL-GEN

Initials of Deputy Clerk_____